No. 12,373

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN STOPPELLI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of the United States District Court for the Northern District of California, convicting the defendant, after a jury trial, of a violation of the Harrison Narcotic Act (26 U.S.C.A. 2553 and 2557) and of a violation of the Jones-Miller Act. (21 U.S.C.A. 174.)

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C.A. 1291.

STATEMENT OF THE CASE.

Five defendants, including appellant, were indicted in the United States District Court for the Northern District of California in an indictment in three counts,

the first count charging a violation of the Harrison Narcotic Act, the second count charging a violation of the Jones-Miller Act, and the third count charging a violation of the conspiracy statute. The appellant made no preliminary motions. After a trial by jury, all defendants were found guilty on all counts. All defendants made motions for a judgment of acquittal at the end of the Government's case and at the close of all the evidence. All defendants moved for a new trial and, with the exception of the trial Court granting appellant's motion for a new trial on the conspiracy count of the indictment, the third count, all motions were denied. The appellant was sentenced to imprisonment for a period of six years and to pay a fine of $100.00. The said sentence was imposed as follows: Imprisonment for a period of five years on the first count of the indictment, and imprisonment for a period of six years and a fine of $100.00 on the second count of the indictment, terms of imprisonment to run concurrently. (Tr. 420-421.)

The first two counts of the indictment, of which appellant stands convicted, read as follows:

> "First Count: (26 U.S.C. Sections 2553 and 2557 (Harrison Narcotic Act));
>
> The Grand Jury Charges: That Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli (whose full and true names are, and the full and true name of each of whom is, other than hereinabove stated, to said Grand Jury unknown, hereinafter called 'said defendants'), on or about the 31st day of October, 1948, in the City of Oakland, County of Alameda, State of California, within

said Division and District, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as 12 envelopes, containing approximately 10 ounces and 436 grains of heroin.

Second Count: (Jones-Miller Act, 21 U.S.C. Section 174);

The Grand Jury further charges: That the said defendants, Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli, at the time and place mentioned in the first count of this indictment, within said Division and District, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as 12 envelopes containing approximately 10 ounces and 436 grains of heroin, and the said heroin had been imported into the United States of America, contrary to law as said defendants Raymond A. Leeper, James Marvin Ballard, Andrew Ingoglia, Patrick John McDonough, and John Stoppelli then and there knew." (Tr. 2-3.)

In his "Statement of Facts", appellant has omitted the following uncontradicted facts:

1. The 12 envelopes inside of the package containing the narcotics were of the same size, length, width, color and appearance (Tr. 152).

2. Appellant came from New York (Tr. 55).

3. The narcotics came from New York, according to the codefendant Leeper in a statement he

made to the undercover operative immediately prior to the termination of the criminal design (Tr. 77).

4. The heroin in each envelope contained 80 per cent heroin, and the balance, a reducing sugar (Tr. 37-38).

5. The portion of the fingerprint on one of the envelopes containing the heroin, which the Government fingerprint expert, W. Harold Greene, positively identified as that of the defendant (Tr. 253), contained 14 characteristics similar to that of the known fingerprint of the appellant (Tr. 249). Six such characteristics have been found to be sufficient for identification purposes (Tr. 249).

6. The appellant, when he placed his fingerprint on the envelope, was holding the envelope in his hand at the time the envelope contained a powdery substance (Tr. 264).

7. The print of the appellant was placed on the envelope in question, not more than four weeks prior to the time the envelope containing the narcotics was delivered to the undercover operative (Tr. 261).

8. The date of the offenses is on *or about* October 31, 1948. (Italics supplied.)

9. The conspiracy count, which is not our concern in this appeal, charged a conspiracy not only between appellant and the other four co-defendants to commit the substantive offenses set forth in counts one and two, but with *others to the Grand Jury unknown.* (Italics supplied.)

Furthermore, appellee challenges the assertion made by appellant in his "Statement of Facts" that

there is no evidence that he was in California on October 31, 1948, or at any other time, or that there is no evidence showing that there was ever any contact between the appellant and the codefendants, or their agents, either oral or otherwise. Appellant's print on the envelope containing narcotics, placed there within a relatively short time before being delivered to the undercover operative in Oakland, California, on October 31, 1948, is strong proof that he was in California about the time mentioned in the indictment, and a strong link connecting him, or his agents, with the codefendants, or their agents.

THE HARRISON NARCOTIC ACT.

The Harrison Narcotic Act, under which the appellant is charged in the first count of the indictment, reads in pertinent portion as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possesion of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax." (26 U.S.C.A. 2553 (a)).

THE JONES-MILLER ACT.

The Jones-Miller Act under which the appellant is charged in the second count of the indictment reads in pertinent portion as follows:

> "If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any terriory under its control or jurisdiction contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (21 U.S.C.A. 174).

CONTENTIONS OF APPELLANT.

The appellant contends that his conviction on the first and second counts of the indictment should be reversed on the following grounds:

1. The alleged insufficiency of the evidence.
2. The alleged misconduct of the Government fingerprint expert.
3. The alleged failure to prove venue.

ARGUMENT.

In beginning this discussion appellee invites this Honorable Court's attention to the accepted rule that the verdict of the jury must be sustained if there is substantial evidence taking the view most favorable to the Government to support it, *Glasser v. United States,* 315 U.S. 60, 80, as well as to Rule 52(a) of the Federal Rules of Criminal Procedure, which reads as follows:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

I.

THE ALLEGED INSUFFICIENCY OF THE EVIDENCE.

Appellant contends that there is no evidence that he sold, dispensed or distributed any heroin, in violation of the Harrison Narcotic Act. Since the statute is in the disjunctive the Government needs only prove a sale *or* a dispensing *or* a distribution. *Miller v. United States,* C.C.A. 7, 53 F. (2d) 316, 317.

Appellant also contends that there is no evidence that he fraudulently concealed or facilitated the concealment of any heroin, in violation of the Jones-Miller Act. Evidence that appellant was *or had been* in possession of the heroin is sufficient to sustain a conviction under this statute.

Although it is unnecessary to show that the appellant had possession of all the narcotics mentioned in the indictment, there is sufficient evidence to sustain such a conclusion. The undisputed testimony shows

that all of the twelve envelopes contained 80 per cent heroin, and the balance, a reducing sugar (Tr. 37-38), and that the twelve envelopes were of the same size, length, width, color and appearance. (Tr. 152.) Thus, one may logically conclude that, since appellant handled one envelope containing narcotics, he handled them all. That he handled one envelope containing narcotics is conclusively shown by the uncontradicted testimony of W. Harold Greene, the government finger-print expert, that appellant placed his fingerprint on the envelope when he held it in his hand and when it contained a powdery substance, it being remembered that heroin is a powdery substance. (Tr. 264.) Since the heroin at one time was in appellant's possession and shortly thereafter was found in the possession of one of the codefendants, it is reasonable to assume that either appellant dispensed or distributed the narcotics to his agent who, in turn, transferred the narcotics to one or more of the codefendants, or that appellant transferred them to one of the codefendants, or one of their agents. This constitutes a violation of the Harrison Narcotic Act as set forth in the first count of the indictment.

Appellant has been shown by overwhelming evidence to have had possession of the heroin. This evidence is fingerprint evidence and a fingerprint identification is much more satisfactory even than eyewitness identification. In *Parker v. The King,* 14 C.L.R. 681, 3 B.R.C. 68 (High Court of Australia), cited in *State v. Steffen* (Sup. Ct. of Iowa), 230 N.W. 536, it was said:

"A fingerprint is therefore in reality an unforgeable signature. That is now recognized in a large part of the world."

See also

United States v. Kelly (C.C.A. 2), 55 F. (2d) 67;

Duree v. United States (C.C.A. 8), 297 Fed. 70;

Commonwealth v. Albright, 101 Sup. Ct. (Penn.) 317;

Grice v. State (Crim. App. Ct. Texas), 151 S.W. (2d) 211,

and cases cited therein.

The Jones-Miller Act does not, as can be seen, require an eyewitness account of possession. Possession may be shown by circumstantial evidence. There is no stronger evidence of this kind than the uncontradicted and undisputed testimony of a fingerprint expert, for in a sense, fingerprint evidence is "direct" evidence. The following language, therefore, from the Jones-Miller Act is sufficient to sustain appellant's conviction under the second count of the indictment:

"* * *. Whenever on trial for a violation of this section the defendant is shown to have *or to have had* possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." (Italics supplied.)

Appellant contends that there is not one word in the evidence that Stoppelli knew the codefendants, or

saw them, or talked with them, or was connected with them. The heroin which he handled is the connecting link and that connecting link which also answers appellant's contention that he was never in California. The uncontradicted testimony of the Government fingerprint expert is not, as appellant suggests, a thin thread of evidence, giving rise only to the barest of suspicion, but in truth and in fact is that conclusive type of evidence which destroys not only any vestige of reasonable doubt but also any possible or even fanciful doubt. Appellant challenges the testimony of the fingerprint expert in his opening brief. Appellant's counsel vigorously, but without success, challenged the fingerprint expert when he cross-examined him lengthily during the course of the trial. The appellant, however, did not, during the course of the trial, call in an expert of his own to testify although he had the opportunity to do so; his counsel was furnished with enlargements of the known print, and the print found on the envelope containing narcotics. (Tr. 255-256.) The reason is, of course, obvious. He knew that any expert which he might call could not shake the testimony of Mr. Greene. That Mr. Greene is a fingerprint expert can not be challenged in the light of his long training and experience in this field of identification. (Tr. 245-247.) Appellant argues, on page 9 of his opening brief, that the testimony of Mr. Greene is nothing more than "sheer speculation". The jury found otherwise, and its decision was the only one it could have properly reached.

Appellant, in his opening brief, in support of his proposition that Appellate Courts have reversed convictions where the evidence was much stronger than the evidence in our case at bar, cites the following authorities:

Ching Wan v. United States, 9th Cir., 35 F. (2d) 665;

Morei v. United States, 6th Cir., 127 F. (2d) 827, 836;

Philyaw v. United States, 8th Cir., 29 F. (2d) 225, 227;

Kassin v. United States, 5th Cir., 87 F. (2d) 183, 184.

Appellee has no quarrel, generally, with the correctness of these decisions. These decisions, however, can be easily distinguished from our case at bar.

In *Ching Wan v. United States,* supra, a codefendant who had merely driven an automobile in which the defendant transported a box containing narcotics was convicted of facilitating the transportation of narcotics. This Court properly reversed his conviction for insufficiency of evidence because it was not shown that he was more than a mere "conduit" and there was no evidence of guilty knowledge on his part. Here the case is entirely different. The appellant insists that there is nothing but suspicion that the envelope herein contained heroin at the time the fingerprint was made. Appellee asserts that it is inherently improbable that the powdery substance which appellant handled when he placed his fingerprint on the envelope was anything other than the heroin which was

later delivered by one of the codefendants to the undercover operative in Oakland. What is inherently improbable, of course, under the law may be completely disregarded. *In re Leslie,* 119 Fed. 406, 408. It is, however, a reasonable inference that a person who acts as a mere "conduit" in the transportation of a box does not know its contents, as it is also a reasonable inference that a defendant who handles small envelopes with narcotics in them has guilty knowledge of their contents.

The case of *Morei v. United States,* supra, is of little assistance to the appellant herein, because the defendant Evans, whose conviction was reversed, was not shown to have had possession of the narcotics. Evans was merely an employee of one of the defendants who did have possession of the narcotics and, as the Appellate Court stated, in relation to his activities:

> "* * * he conducted himself exactly the same as he would have done had he been engaged in legitimate employment."

In this case, it is not amiss to point out that the Appellate Court reiterated a settled rule of law that "unjustified and speculative inferences" must be laid aside. This language strengthens appellee's assertion heretofore made. Certainly any suggestion that the powdery substance in the envelope, when the appellant placed his fingerprint thereon, was not heroin, is an unjustified and speculative inference, which must be completely disregarded.

Appellant's reliance on the case of *Philyaw v. United States,* supra, is difficult to understand unless it was done for the purpose of reiterating a legal principle about which there is no dispute. It this case the defendant, whose conviction of illegally removing and concealing untaxed whiskey was reversed, was never shown to have had possession of the contraband. In setting forth the grounds for its reversal of the conviction, the Appellate Court said, at page 227, as follows:

> "There is no direct evidence that the defendant had anything to do with the removal or concealment. The most that could be said is that the whisky must have been removed by some one from the place where distilled. The only evidence connecting the defendant with the charge is that, a few days before the whisky was found, he said he had some liquor to sell, and sold some, which he obtained from this house; that the whisky was found in a house located on a plantation owned by him, and that in several houses located on the same plantation was evidence that liquor had at some recent time been distilled therein."
>
> * * * * * * *
>
> "* * * From these facts it is just as probable that the liquor was removed and placed in the attic of this house by some person other than the defendant as that it was removed and so placed by him.
>
> There is evidence from which it could be properly assumed that the defendant owned the liquor found. But wherein are the facts from which a natural inference can be drawn that he removed

> it or concealed it after removal, unless it be an assumption based upon an assumption?"

Certainly no one can argue that it was just as probable that the fingerprint on the envelope containing the heroin belonged to some person other than the appellant, or that the powdery substance in the envelope, when appellant placed his fingerprint thereon, was a substance other than heroin. Accordingly, appellant accomplished nothing when, quoting from the *Philyaw* case, he italicized the words "an assumption based on an assumption".

Appellant relies on the case of *Kassin v. United States,* supra. In this case the defendant was jointly indicted with several others for misapplying funds and falsifying records of a national bank, and for conspiracy to misapply these funds and falsify these records. Appellee is in complete accord with the legal principle of this case, as set out at page 12 of appellant's opening brief, but the factual situation in the *Kassin* case, rendering it inapplicable to our case at bar, may be clearly shown by reference to this language of the Appellate Court in its decision, at page 185:

> "Examining and appraising these circumstances, individually and together, by the rules governing criminal trials, we find them wholly wanting in probative relevancy and force. Appellant's being in Florida and registering under assumed names standing alone had neither logical nor legal relevancy to the charge for which he was on trial. He may have had any number of rea-

> sons for his presence in Florida, and for his conduct there. His taking out of a deposit box in the bank in Florida, still under an assumed name, by itself had absolutely no tendency to prove his guilt. Relevancy is not supplied, probative force is not given to these circumstances by the additional proof that some of those charged with him had deposit boxes in the same bank and some of them were registered at the same hotels at which he registered at or about the same time."

Furthermore, the *Kassin* case contains the following language, at page 184, which is particularly damaging to the appellant herein:

> "Circumstantial evidence can indeed force a chain of guilt and draw it so tightly around an accused as almost to compel the inference of guilt as matter of law. Again, circumstantial evidence may forge the chain and draw it tight by legally justifiable, rather than absolutely compelling, inferences."

The fingerprint of Stoppelli on the envelope containing the narcotics, the fact that he handled the envelope when it contained a powdery substance, the fact that heroin is a powdery substance, the fact that all of the 12 envelopes containing the narcotics were of the same kind and description, the fact that each envelope contained the same percentage of heroin and the same percentage of a reducing sugar, the fact that the appellant came from New York, the fact that there is evidence that the narcotics which were delivered to the undercover operative in Oakland came

from New York, the fact that the amount of narcotics involved was large, the fact that the narcotics were delivered to the undercover operative by a codefendant within a relatively short time after Stoppelli placed his fingerprint on one of the envelopes—all of these facts constitute circumstantial evidence forging a chain of guilt so tightly around the appellant as to almost compel the inference of guilt as a matter of law.

In *Pitta v. United States,* 164 F. (2d) 601, 602, this Honorable Court said:

> "* * *. Possession of any sort is sufficient to raise the presumption and to place upon the accused the burden of explaining the possession to the satisfaction of the jury. Ng Choy Fong v. United States, 9 Cir., 245 F. 305, certiorari denied 245 U.S. 669, 38 S. Ct. 190, 62 L. Ed. 539; Yee Hem v. United States, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904. *The aim of the statute is to stamp out the existence of narcotics in this country except for legitimate medical purposes.* Yee Hem v. United States, supra. It follows that the evidentiary consequence flowing from proof of possession was here operative." (Italics supplied.)

That full force and effect are being given to the avowed purpose of Congress to wipe out the illicit traffic in dangerous drugs, may be seen by reference to countless decisions of Appellate Courts upholding convictions in the lower Courts under the Narcotic Statutes.

See *Camou v. United States,* 276 Fed. 120, in which a conviction for concealment was sustained by this

Honorable Court, where the primary evidence disclosed that the defendant had keys to a trunk in which the narcotics were hidden.

See *Pon Wing Quon v. United States,* 111 F. (2d) 751, wherein this Court held that proof that the defendant placed a customs label on a trunk containing opium with the probable effect of preventing customs inspection, was sufficient proof of the *corpus delicti* to authorize the admission of defendant's confession.

See also *Brady v. United States,* 148 F. (2d) 394, wherein the evidence was held sufficient by this Court to sustain a conviction of defendant and his wife for receiving, concealing and transporting heroin, where, immediately prior to the arrest of defendant's wife, the defendant threw the package containing the narcotics on to the floor of a public garage.

See also the following decisions of this Honorable Court:

Sam Wong v. United States, 2 F. (2d) 969;
Rosenberg v. United States, 13 F. (2d) 369;
Hooper v. United States, 16 F. (2d) 868;
Borgfeldt v. United States, 67 F. (2d) 967;
Wong Chin Pung v. United States, 142 F. (2d) 57.

In view of the foregoing, and particularly in light of the statutory presumptions arising in favor of the Government under the Harrison Narcotic Act and the Jones-Miller Act, the inescapable conclusion inevitably follows that on the basis of the fingerprint expert's testimony alone the evidence is sufficient to sustain the verdict of the jury on both counts of the indictment.

II.

THE ALLEGED MISCONDUCT OF THE GOVERNMENT FINGERPRINT EXPERT.

Appellant complains that the following testimony given by W. Harold Greene, the Government fingerprint expert, which he cites at pages 14 and 15 of his opening brief, deprived him of a fair trial:

> 1. "Q. Now how did you come to that conclusion that the print on the envelope is the print that belonged to John Stoppelli, the defendant?
>
> A. We have a national book, every district supervisor in the country, in the Narcotics Bureau, has a national book published by the Narcotics Bureau, all of the major known——" (Tr. 254.)

> 2. "A. In my opinion he grasped it this way (indicating), which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type——" (Tr. 265.)

Appellant assumes from the first answer of Mr. Greene that the jury inferred that appellant was a major known narcotic peddler. No such inference is warranted. As a matter of fact, it appears that not even the trial judge received such an impression as may be seen by reference to his remarks made at the time the appellant, a five-time convicted felon, requested his release on bail pending appeal:

> "I know nothing about this particular defendant other than that what has been shown in the trial of the case." (Tr. 380.)

> "Do you have that record?" (Tr. 381.)

Counsel for appellant suggests in his opening brief that the prosecuting attorney admonished his own witness. The record will show that this is not correct. All he said to Mr. Greene at that juncture was: "Just a minute, pardon me——" It was counsel for the appellant who did the admonishing, and after such admonishment by him the Court instructed the jury:

> "Yes. I first instruct the witness to confine his answers to questions. Don't go beyond the scope of the question asked by counsel. I strike the answer this witness just made in so far as he made an answer, and I instruct the jury to entirely disregard the answer which I have just stricken from the record. Any and all matters that are stricken from the record must be entirely disregarded by the jury. Proceed." (Tr. 254.)

It is highly significant that Mr. Greene used the phrase "*all of* the major known——" (italics supplied) and not the phrase *of all* the major known——, giving rise to the inference that the words "major known" were to be followed by these words: other law enforcement officials who likewise had the national book. This, however, is only conjecture on the part of the appellee, but conjecture more logical and compelling than the sheer unfounded speculation indulged in by counsel for the appellant as to what inference the jury actually drew from Mr. Greene's remarks.

In this connection, appellee calls attention to the following remarks addressed by the trial judge to counsel for appellant at the time he denied appellant's renewed motion for the mistrial, remarks which con-

vincingly destroyed any argument made by the appellant that Mr. Greene's unfinished answer deprived appellant of a fair trial:

> "The Court. It might be anything. Don't you think that we have got to assume that a jury of twelve men and women who are sworn to try the case solely upon the evidence and upon the instructions of the Court that when the Court specifically, definitely instructs that jury to entirely disregard a statement of that kind, having in mind the statement is merely something you have to stretch to a conclusion that is not expressed by the witness—don't we have to assume that a jury is going to perform that solemn obligation in determining the guilt or innocence of a defendant as the law request them to determine it?" (Tr. 303.)
>
> * * * * * * *
>
> "The Court. He did not necessarily say, or the inference is not necessarily drawn, that he was referring to the major known dealers in narcotics. The major known sources of narcotics, the major known methods of distribution, sale, and so forth—we do not know what he had in his mind, and I do not think that sort of statement is sufficient to warrant a court in declaring a mistrial. I think the matter has been eradicated in the instruction I have given to this jury, and I am going to assume that the jury is composed of twelve fair and impartial men and women with a conscientious determination to do their duty as they should do it. The motion for a mistrial will not be granted." (Tr. 305.)

These remarks of the trial judge are all the more compelling when it is realized that no statement or sug-

gestion was ever made by Mr. Greene, or anyone else, in the presence of the jury as to what were the contents of the book in question.

Appellant complains in his brief, as hereinabove indicated, about this phrase spoken by Mr. Greene: "men of experience of that type". These words, when taken in conjunction with the rest of the answer, indicate nothing more, perhaps, than the fact that appellant might be skilled in the art of placing things in envelopes. As a matter of fact, the phrase would not necessarily have to refer to appellant. Certainly there is nothing in Mr. Greene's answer to even remotely suggest that the appellant was a man with criminal propensities, or that he was skilled in the art of handling narcotics. Had counsel for the appellant not interrupted the direct examination of Mr. Greene with the question, "What fashion was that?", the prosecution, after Mr. Greene had answered counsel for the appellant, might not have asked the next question which elicited the answer to which appellant now takes exception. (Tr. 265.) Furthermore, if there was any possible error on this score, the Court's cautionary instruction to the jury, when the remark was ordered stricken (Tr. 266), and his instruction in this regard when he gave his final charge to the jury (Tr. 356), was sufficient to cure that error. (Tr. 266.) That the appellant himself thought very little of the incident may be seen by a careful reading of the transcript of record which discloses that, after his original brief objection, he never mentioned the matter again, not even when he renewed his motion for a mistrial, nor when he moved for a judgment of

acquittal, nor when he moved for a new trial. The first inkling the prosecution received that appellant was taking a very serious view of this latter remark of Mr. Greene was when he read it, couched in extremely sharp language, in appellant's opening brief.

Appellant now, for the first time, complains, at pages 16 and 17 of his opening brief, of certain statements made by the prosecuting attorney in his opening address to the jury. How the appellant can say that these remarks are prejudicial and "shocking", is beyond understanding, when a reading of the following applicable statute shows them to be a correct statement of the law:

> *"Principals*
>
> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.
>
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such." (18 U.S.C.A. 2.)

In support of his contention that the remarks of Mr. Greene constituted reversible error, and that no cautionary instructions of the Court could cure what he considers to be error, the appellant relies on the following cases wherein the convictions were reversed:

Kotteakos v. United States, 328 U.S. 750, 764, 765;

Hatchett v. United States, 293 Fed. 110 (should be page 1010);

Smith v. United States, 9th Cir., 10 F. (2d) 787, 788;

Gold v. United States, 2nd Cir., 26 F. (2d) 185, 186;

United States v. Dressler, 7th Cir., 112 F. (2d) 972, 977 and 978, citing *Boyd v. United States,* 142 U.S. 450;

Middleton v. United States, 8th Cir., 49 F. (2d) 538, 540;

Sang Soon Sur v. United States, 9th Cir., 167 F. (2d) 431, 432, 433;

Templeton v. United States, 6th Cir., 151 F. (2d) 706, 707, 708.

Appellee does not challenge the correctness of these decisions. Appellee, however, says of these decisions, as of the other cases heretofore cited by appellant, that the factual situations therein are not analogous, or even slightly comparable, to the factual situation in our case at bar.

In the case of *Kotteakos v. United States,* supra, the defendants were charged with conspiracy to violate the National Housing Act. The Supreme Court, at page 763, after citing *Weiler v. United States,* 323 U.S. 606, 611, to the effect that it is not the Appellate Court's function to determine guilt or innocence, held in substance that it was prejudicial in the light of the trial Court's instructions to join unconnected conspiracies into a general conspiracy charge, and, commenting on the "harmless error" statute, held that the error was fatal. The Supreme Court, however, at page 769, citing *Bollenbach v. United*

States, 326 U.S. 607, 613, seemed to suggest that if the jury had not been misled by the misdirection of the trial Court and the circumstances of this complicated case, their decision might have been otherwise. See also *Berger v. United States,* 295 U.S. 78, referred to in the majority, as well as in the dissenting, opinions.

In *Hatchett v. United States,* supra, over objection of counsel, testimony was elicited from the arresting officer by the presecution that the defendant, who was on trial for larceny, had his picture in the "rogues' gallery", indicating that he was a man of criminal propensities.

In *Smith v. United States,* supra, a narcotic case, the defendant, on being asked his occupation by the prosecution and on replying that his business was selling sandwiches, was then asked that, outside of that occupation, was he not engaged in another business. After the defendant replied in the negative, the prosecution, in rebuttal, called witnesses who testified that the defendant's business was that of selling drugs. The Court in its instruction charged the jury that this rebuttal evidence as to the occupation of the defendant was to be regarded only as affecting his credibility. The Appellate Court held that the defendant's statement that his business was selling sandwiches should have ended the matter, and that the effect of the rebuttal testimony was to show arrest for crimes independent of that for which he was on trial, which error was, of course, not cured by the erroneous instruction of the trial judge.

In *Gold v. United States,* supra, also a narcotic case, the conviction rested entirely on the testimony of an informer and two accomplices who had pleaded guilty. The Appellate Court, taking note of the weakness of such testimony, reversed the conviction on the ground that the prosecution had "trapped" the trial Court into admitting incompetent evidence. In this connection the Appellate Court said, at page 186:

> "The doctrine of completing proof has no application. We regard the prosecuting attorney's effort to bring in the story of what the taxi driver said to Higgins as highly improper. He must have known what Higgins would say, and he must have realized that it was incompetent, or he would have attempted to bring it out on the direct examination of Higgins. Bringing it out on cross-examination trapped the court into admitting incompetent testimony, which he would at once have recognized as incompetent, had the question been asked on direct. We cannot sanction such practice; nor can we, on the facts of this case, feel confident that the error had no effect upon the jury's verdict."

In *United States v. Dressler,* supra, the defendant was tried and convicted of kidnapping, and sentenced to be electrocuted. In this case the Appellate Court stated that the only serious question presented for its consideration arose out of the erroneous admission in evidence of two cards which carried the fingerprints of the defendant. These exhibits were identified and offered solely as fingerprints and were admitted in evidence as fingerprints. When they were received in

evidence, neither the prosecution nor the defendant's counsel was aware that on the reverse side of each card was a criminal record of the defendant. In concluding that the conviction should be reversed, the Appellate Court said, in part, as follows:

> "The net result of the jury's having access to the criminal history of defendant was that the jury was informed that the defendant had been convicted of the crime of robbery and had been sentenced to imprisonment for a term of ten years; that he had been arrested on the charge of violating the Dyer Act, 18 U.S.C.A. § 408; that he had been arrested on the charge of rape and on some other charge designated as 'Unlawful F. to A. P. in St. of Okla.' The jury also learned that there was a criminal record on file in the U. S. Bureau of Investigation, Department of Justice. The foregoing information was before the jury during their deliberations in the jury room without any instruction or direction by the court, and we are not free to conjecture that the members of the jury were conscious of any limitations or restrictions upon their use of it.
>
> It is not questioned by the government that the information conveyed to the jury under the heading 'Criminal History' on each card was inadmissible and should not have been permitted to go to the jury. The Government does contend, however, that the cause of defendant was not prejudiced by the consideration of such information by the jury." (Page 977.)

* * * * * * *

> "If the only question before the jury had been that of guilt or innocence, we believe that the defendant's confession and his own testimony on the witness stand were sufficient to render harm-

less the consideration of the information furnished by the 'criminal history.' The confession and testimony of defendant constituted a detailed statement of what amounted to a plea of guilty to the charge of kidnaping. Obviously it would be an irrational conclusion to assume that the jury was influenced to any extent in finding the defendant guilty by the 'criminal history' when the defendant had frankly admitted the commission of all the acts which constituted guilt under the kidnaping statute. But different considerations are involved in appraising the effect of the 'criminal history' upon the minds of the jurors while they were engaged in deciding whether the death penalty should be recommended. The decision of that question called for an exercise of discretion and an evaluation of any mitigating circumstances. *It was the duty of the jury to determine whether the defendant in view of all the circumstances surrounding the commission of the crime, merited the death penalty.* In respect to the issue of guilt or innocence of the defendant the jury was bound by strict law to return a verdict of guilty if it found that the defendant had committed certain acts; while in exercising its privilege of recommending imposition of the death penalty the jury was not bound by strict rules of law but acted on its appraisal of the character of the conduct of the defendant as evidenced by his acts which were related to the commission of the crime with which he was charged." (Italics supplied.) (Pages 979, 980.)

From this language it may be reasonably concluded that if this were not a case involving the death penalty, the conviction would not have been reversed.

In *Middleton v. United States,* supra, the Appellate Court reiterated the rule that where there has been *substantial* error it can not be cured by the Court's instruction to the jury to disregard it, although this holding seems to conflict with the contrary intimation in the *Dressler* case. In the *Middleton* case, the defendant, who was convicted of conspiracy with other defendants to transport and possess intoxicating liquor, on being asked whether he had ever been convicted of certain misdemeanors, answered, over objection, that he had been, in the United States Court, on three occasions of selling liquor, and further admitted that he had been fined for such violations. Although the Court afterward, on its own motion, withdrew this testimony and instructed the jury to disregard it, the Appellate Court held, as above indicated, that the cautionary instructions of the Court could not cure the error arising out of the violation of the settled rule that such questions must be limited to convictions for felony, infamous crimes, or crimes involving moral turpitude. It should be pointed out, however, that the decision in this case was rendered prior to the time that the Supreme Court, in *Berger v. United States,* supra, at page 82, put an end to the rule, formerly existing, that "error being shown, prejudice must be presumed", and firmly established "the more reasonable rule that if, upon examination of the entire record, substantial prejudice does not appear, the error must be disregarded as harmless".

In *Sang Soon Sur v. United States,* supra, citing *Berger v. United States,* supra, this Honorable Court,

in reversing a conviction for income tax evasion where there was read into the evidence, over objection, a statement given by the defendant to an Internal Revenue Agent that he had been arrested several times and also convicted of a narcotic violation, indicated that to warrant reversal the error must be glaring and obviously harmful. In this decision, while stating that evidence of the character complained of had been held to be of such a prejudicial character that cautionary instruction on the part of the trial Court to disregard it could not cure its harmful effect, this Honorable Court, however, did not say that had such a cautionary instruction been given in this case, its decision would have been the same.

In *Templeton v. United States,* supra, a liquor law violation case, the defendant and his alibi witnesses, over objection, in response to the question of the prosecutor whether they were related to a notorious bootlegger, answered in the affirmative. In properly reversing the conviction the Appellate Court stated, at page 708:

> "* * *. Without any foundation in fact for showing such a connection, this testimony tended to connect appellant, who was charged with a violation of the liquor laws, with Carter, a reputed criminal of the same type. Had it not been admitted the defense of an alibi would have had a basis sufficient to justify the jury in returning a verdict of not guilty."

It is highly significant that in the cases cited by appellant, with exception of the *Middleton* case, the trial

Court either failed to give the jury the correct instruction, as in the *Smith* case, or to clarify a multitude of legal complexities, as in the *Kotteakos* case, or to give any instructions whatsoever in the remaining cases. That a proper cautionary instruction, in the absence of exceptional circumstances, cures error, is supported by the overwhelming weight of authority. This principle was clearly stated in *Remus v. United States* (C.C.A. 6), 291 Fed. 501, 510, certiorari denied 263 U.S. 717:

> "The general rule is that where evidence erroneously admitted is withdrawn from the consideration of the jury by the direction of the presiding judge, such direction cures any error which may have been committed by its introduction. Throckmorton v. Holt, 180 U.S. 552, 567, 21 Sup. Ct. 474, 45 L. Ed. 663; Hopt v. Utah, supra; Pennsylvania Co. v. Roy, 102 U.S. 452, 26 L. Ed. 141. It is also true that in exceptional instances the withdrawal of evidence improperly admitted does not cure the error, but this does not appear to be such a case."

To the same effect, see the decision of this Honorable Court in *Metzler v. United States,* 64 F. (2d) 203, 207, 208.

In *Looker v. United States,* (C.C.A. 2), 240 Fed. 933, 935, the Court, after also citing, among others, the cases of *Hopt v. Utah,* 120 U.S. 430, and *Throckmorton v. Holt,* 180 U.S. 552, made this compelling pronouncement:

> "It is only when evidence unlawfully admitted is of such apparent weight, and so prejudicial in

effect, that the judicial warning against it seems light and unavailing by comparison, that the error remains uncured."

In *United States v. Maggio* (C.C.A. 3), 126 F. (2d) 155, 159, certiorari denied 316 U.S. 686, a liquor case in which incompetent evidence was introduced, over objection, and later stricken and the jury told to disregard it, the Appellate Court, in interpreting the "harmless error" statute, said:

> "A witness testified, over objection, that Ciccone rented a house in Asbury Park where he intended to install a still. After it became clear that the testimony as to the rental of the Asbury Park house would not be connected by the government with any of the charges in the indictment the trial court ordered the testimony stricken and instructed the jury to disregard it. * * * We think that in view of the action of the trial court the effect of the wrongful admission of this evidence was not such as to substantially affect the rights of the defendant Ciccone. Beyer v. United States, supra, and Thompson v. United States, supra, relied upon by the defendants are not apposite, however, *for in neither was an effort made to eradicate the effects of the inadmissible testimony.*" (Italics supplied.)

In *United States v. Zeoli* (C.C.A. 3), 170 F. (2d) 358, 360, wherein the defendant sought reversal "upon the ground that an experienced Government witness presented hearsay testimony after having been cautioned by the Court", the Appellate Court refused such reversal on the ground that the "statements of the witness definitely were not of a nature to create

an *ineradicable prejudice* in the minds of the jury". (Italics supplied.)

In *Jarabo v. United States* (C.C.A. 1), 158 F. (2d) 509, 515, a case in which the defendant was convicted of a violation of the White Slave Traffic Act, the Appellate Court, in refusing to reverse the conviction, indicated in the following language the curative effect of the proper cautionary instructions:

> "His principal criticisms of the prosecuting attorney are that on one occasion he referred to a woman who had been photographed by the appellant as one of his 'victims', and that in cross-examining one of the appellant's medical experts he undertook to show that the expert had testified in court a great many times and on several occasions his testimony had not been believed. Upon objection the prosecuting attorney immediately substituted 'persons or subjects' for 'victims' and as soon as the court discerned the trend of the cross-examination of the medical expert it promptly prevented its continuance. Certainly what was said and done by the prosecuting attorney was not so serious that we can conclude that the corrective actions taken were futile. On the contrary it seems to us that such prejudice as the conduct of the prosecuting attorney may have engendered was completely cured.
>
> The appellant also complains that certain witnesses interjected irrelevant and prejudicial comments into their answers. Typical examples are the remarks of the woman who testified in support of the charges laid in count one that 'I thought he was a real good boy but never thought that he was the kind he is', and 'He has ruined my life.' Since the court below repeatedly ad-

monished the witness not to make such remarks, and since at the time they were made instructed the jury to disregard them we think any prejudice they may have aroused was adequately eradicated. At least we can not say in the light of the entire record that the remarks were so highly prejudicial that the measures taken could not have been effective so that as a result the appellant should be given a new trial.

It will suffice to say in summary that a careful consideration of all the instances of alleged unfairness at the trial viewed both individually as isolated events and collectively for their cumulative effect, convinces us that guarding against the *'Magnification on appeal of instances which were of little importance in their setting'* (*Glasser v. United States, 315 U.S. 60, 83, 62 S. Ct. 457, 471, 86 L. Ed. 680, and cases cited*) we cannot conclude that the appellant has been denied a fair and impartial trial." (Italics supplied.)

See also,

Holsman v. United States (C.C.A. 9), 248 Fed. 193, 196, certiorari denied 249 U.S. 600;

Ginsberg v. United States (C.C.A. 5), 96 F. (2d) 433, 436;

United States v. Ginsburg (C.C.A. 7), 96 F. (2d) 882, 885;

Utley v. United States (C.C.A. 9), 115 F. (2d) 117, 119;

Hilliard v. United States (C.C.A. 4), 121 F. (2d) 992, 998, certiorari denied 314 U.S. 627;

United States v. Amorosa (C.C.A. 3), 167 F. (2d) 596, 598.

To summarize: The remarks of the fingerprint expert were not error. If assuming *arguendo,* they were, the effect upon the jury could only be slight, and the error was cured by the cautionary instructions of the trial Court. To paraphrase the words of the Supreme Court, in *Glasser v. United States,* 315 U.S. 60, 83, as cited in *Jarabo v. United States,* supra, the appellant herein has magnified on appeal instances which were of little importance in their setting.

III.

THE ALLEGED FAILURE TO PROVE VENUE.

What is venue?

Rule 18 of the Federal Rules of Criminal Procedure provides the answer:

> "Except *as otherwise permitted by statute* or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed." (Italics supplied.)

The first time that counsel for the appellant specifically urged the proposition that there was a total failure of proof of venue to establish jurisdiction of the United States District Court for the Northern District of California was in his amended statement of points on appeal. (Tr. 426.) Counsel suggests that the proper venue and place of trial for the substantive offenses of which Stoppelli was convicted was the

Southern District of New York, and not the Northern District of California.

Appellee wonders whether this as a tacit admission by appellant that he committed the violations in the Southern District of New York. Appellant argues that in order to sustain his conviction the Court would necessarily have to infer that he had possession of the envelope with the heroin in the Northern District of California, and that it would also have to infer that there was heroin in the envelope, which, to use his exact words, "would be nothing but an inference based upon an inference". Counsel for appellant apparently has confused the term "inference based upon an inference" for, in effect, he is saying that the prosecution is not permitted to establish separate elements of the crime by circumstantial evidence, which position is, of course, untenable. Appellee does not, as appellant says, have to presuppose that appellant had possession of the heroin, because the evidence is conclusive in this regard. Furthermore, it should be repeated that a jury has a right to strongly believe that where a package with a large amount of narcotics is found in California, and Stoppelli's fingerprint is on one of the envelopes containing the narcotics, either Stoppelli, or one of his agents, was in California, and if his agent was in California, then he is, of course, bound by the acts of his agent. The only possible explanation that could be given is that the narcotics were stolen from Stoppelli. This might relieve him of prosecution for selling, dispensing or distributing narcotics under the Harrison Act, but not of

prosecution under the Jones-Miller Act, and if it were conclusively shown that the narcotics were stolen from Stoppelli when he was in New York, then he could be prosecuted in New York, but no such proof was offered, and for an obvious reason. Stoppelli does not show such proof because he wishes to relieve himself of criminal responsibility in New York, as well as in California. Appellant, having failed to produce evidence that the heroin was stolen from him in New York, or that he was not in California at the time the heroin was passed to the undercover operative, or within a four-week period prior thereto, appellee, in view of the evidence herein and in reliance on the presumptions arising out of possession, asserts that venue has been clearly established. This question was considered in *Mullaney v. United States,* 82 F. (2d) 638, in which case this Honorable Court, at page 641, clearly stated the prevailing rule which is binding on the appellant herein:

> "This Court expressly held, in Casey v. United States, 20 F. (2d) 752, that the presumption contained in the statute extended also to venue. This was proved on appeal Id., 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed. 632."

Appellant has mentioned this case and this quotation on page 25 of his opening brief but he argues that this Honorable Court did not mean to say what it actually said. In effect, he argues that this Court wrongfully interpreted the decision in *Casey v. United States* (C.C.A. 9), 20 F. (2d) 752, as approved on appeal by the Supreme Court in 276 U.S. 413. It goes without saying that counsel for the ap-

pellant has erroneously analyzed these decisions, decisions which have never been overruled, and which, to say the least, state the rule of law binding on the Courts in the Ninth Circuit. Furthermore, the United States Court of Appeals for the Fifth Circuit has asserted the same rule in *Acuna v. United States,* 74 F. (2d) 359, 360, a decision referred to by this Honorable Court in the *Mullaney* case. In the *Acuna* case, the Appellate Court, in affirming a conviction for illegal purchase of narcotics under the Harrison Act wherein there was no evidence of the place of the alleged purchase, after holding that the conviction must rest on the defendant's possession of the unstamped bottle containing 12 grains of morphine, aided by the presumption set forth in the statute, said as follows:

> "* * *. The statutory presumption is not arbitrary or unreasonable or without any logical basis. Persons ordinarily do not and cannot make morphine, but get it most often by buying it. If it is found in an unstamped container, there is some probability that it was acquired unstamped. The possessor best knows how and where he got it, and the statute affords him full opportunity to show the truth. The prima facie presumption indeed is only a means of putting the burden of proof on him as to matters within his peculiar knowledge, and there is nothing new or unreasonable in doing that. *But it is specially urged that venue cannot be presumed, and it was so held at first under this statute. The Supreme Court in Casey v. United States,* 276 U.S. 413, 48 S. Ct. 373, 72 L. Ed. 632, *referred to these decisions and disapproved them, affirming the hold-*

> *ing in (C.C.A.)* 20 F. (2d) 752, *that venue could be so established* and that Congress must have intended the presumption to cover the place of purchase as well as the fact of purchase, since there was the same difficulty of proof of each to the prosecution, and the same facility to the accused of showing the truth if the presumption was in any case incorrect." (Italics supplied.)

The appellant, in attempting to minimize the terrific impact which the Casey and Mullaney, as well as the Acuna, decisions have had upon his fruitless efforts to extricate himself from the predicament in which he deservedly finds himself, is able only to cite the following three cases:

> *Brightman v. United States,* 8th Cir., 7 F. (2d) 532;
>
> *Vernon v. United States,* 146 Fed. 121;
>
> *United States v. Jones,* 7th Cir., 174 F. (2d) 747, 748, 749.

These cases, as will be seen, are either clearly distinguishable from our case at bar, or are in conflict with the prevailing rule.

In *Brightman v. United States,* supra, in reversing a conviction for unlawful purchase of narcotics in violation of the Harrison Narcotic Act, where there was no evidence as to where the narcotics had been purchased, the Appellate Court held that there was no "rational connection between the fact of possession of morphine in the Western District of Oklahoma and the fact of the purchase of it in that same district as to make the former prima facie evidence

of the latter". In *Casey v. United States,* supra, the defendant relied on the decision in the *Brightman* case, but without success, for, as has already been pointed out in the *Acuna* case, the Supreme Court disapproved this earlier decision. In the *Brightman* case, it was also suggested that the presumption of venue arising out of possession could not be constitutionally upheld, citing *Vernon v. United States,* 141 Fed. 121, from which latter case appellant also quoted in his opening brief, at page 27. This Honorable Court, however, in the *Mullaney* case, also considered this constitutional objection and found it to be without merit, citing, in support thereof, the *Casey* case, as well as its decision in *Hooper v. United States,* 16 F. (2d) 868, and cases cited therein.

The case of *United States v. Jones,* supra, likewise gives the appellant little comfort, for in this case there was no evidence to show that either the defendant or the narcotics was ever found in the district wherein the offense was laid. It is interesting to note that the Appellate Court, in the *Jones* case, cited as authority, among others, the *Brightman* and *Vernon* cases, supra, which decisions, as above indicated, no longer recite the prevailing rule. The *Jones* case also holds that a motion for a judgment of acquittal preserves the objection as to lack of venue, even though the specific question was not urged upon the lower Court during the course of the trial. That there is some authority to the contrary may be seen by reference to the case of *Fleitas v. United States* (C.C.A.-5), 40 F. (2d) 636, wherein it is intimated by the Ap-

pellate Court, citing, among others, the case of *Casey v. United States,* supra, that in asking for a judgment of acquittal the attention of the Court should be specifically directed to the alleged insufficiency of proof of venue. But, regardless of whether or not a motion for a judgment of acquittal preserves the question of the alleged failure to prove venue, where it is not specifically urged, this fact could not possibly affect the result in our case at bar. Appellant, in his opening brief, has quoted the following language, in the case of *United States v. Jones,* but appears to have completely ignored its import:

> "Venue does not have to be proved by direct and positive evidence. If, upon the whole evidence it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient."

Perhaps the appellant was also unaware of the significance of these additional words in the decision of the Appellate Court, which immediately follow the language hereinabove set out, but which appellant has omitted in his opening brief:

> "However, venue will not be inferred from proof that the acts constituting the crime were committed upon certain streets, where the city within which the streets are located is not identified. The court will not take judicial notice that the streets referred to in evidence are in any certain town."

In this connection attention is also directed to another decision of the United States Court of Appeals

for the Seventh Circuit, in *United States v. Karavias,* 170 F. (2d) 968, 970, wherein it was declared:

> "The general rule governing proof of venue is that there need be no positive testimony that the violation occurred at a specific place, but that it is sufficient if it can be concluded from the evidence as a whole that the act was committed at the place alleged in the indictment. George v. United States, 1942, 75 U.S. App. D.C. 197, 125 F. (2d) 559; People v. Allegretti, 1920, 291 Ill. 364, 126 N.E. 158; People v. Reynolds, 1944, 322 Ill. App. 300, 54 N.E. (2d) 850, and cases cited. And, as stated by this Court in Wallace v. United States, 7 Cir., 1917, 243 F. 300, 306, 'venue, like any other fact, may be shown by evidence, direct, indirect or circumstantial'."

That there has been a confusion on the part of counsel for defendants as to the definition of venue may be seen by reference to this language in *Cooper v. United States* (C.C.A.-5), 91 F. (2d) 195, 198, 199, cited with approval in *Palmero v. United States* (C.C.A.-1), 112 F. (2d) 922, at page 926:

> " 'The constitutional provisions as to venue in Article 3, §2, and in the Sixth Amendment, require trial where "the crime shall have been committed", not where the accused was when the crime was committed.' "

The presumption of venue arising out of possession under the Harrison Narcotic Act and the Jones-Miller Act, which, as above indicated, has been expressly approved in the *Mullaney, Casey* and *Acuna* cases, and authorities cited therein, finds sanction in Rule

18 of the Federal Rules of Criminal Procedure, supra, which defines venue. Rule 18 recites that, where permitted by statute, a prosecution may be had in a district other than where the offense was committed. Title 18 U.S.C.A. 2, supra, is such a statute, providing, in effect, that one who aids in the commission of an offense, or causes the commission of an offense, regardless of where he may be at the time the offense is actually committed, even if outside the territorial limits of the United States, is held accountable in the place where the crime is laid. In *Ford v. United States,* 273 U.S. 593, 623, the Supreme Court asserted the rule as expressed by John Bassett Moore, then Judge of the Permanent Court of International Justice, while he was Assistant Secretary in the State Department:

> "The principle that a man who outside of a country wilfully puts in motion a force to take effect in it is answerable at the place where the evil is done, is recognized in the criminal jurisprudence of all countries. And the methods which modern invention has furnished for the performance of criminal acts in that manner has made this principle one of constantly growing importance and of increasing frequency of application."

The Appellate Court, in *Palmero v. United States,* supra, at pages 924, 925 referring to the case of *Ford v. United States,* said:

> "It is clear, then, that there was an 'importation' or 'bringing in' of the opium when the S. S. Exeter entered the territorial waters of the United States, and a concealment of the same.

> Under the statute importation and bringing in of the opium and concealment of the same thereafter are distinct violations. Appellants aided and abetted the commission of both of these offenses. Krench v. United States, 6 Cir., 42 F. (2d) 354. While it is true that the appellants were outside the jurisdiction of the trial Court during the time the opium was imported or brought in and concealed, they may be convicted of aiding and abetting if the court has jurisdiction of them at the time of the trial."

In passing judgment on our case at bar it must be ever kept in mind that heroin is a proscribed drug (Tr. 37), finding its only outlet, with rare exception, in the illicit market. There is a clear distinction which must necessarily be drawn between those articles which are inherently evil and those articles which possibly may have legitimate use. In *Direct Sales Co. v. United States,* 319 U.S. 703, 710, the Supreme Court, in commenting on this distinction, pointedly said:

> "* * *. The difference is like that between toy pistols or hunting-rifles and machine guns. All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade.

Now, it is true that there are facts that have come out during the course of the trial, and if the Court finds this is too broad an allegation, I would now request the right to amend to make the pleadings conform to the proof as having been presented to the Court.

The Court: Your whole theory is based on a proposition of law which I haven't yet examined, but I gather from your remarks during the trial that irrespective of Young Brothers and the authority it may or may not have granted to its tug captain or allowed the tug captain to display, even though unauthorized, that you, in point of law, believe Young Brothers can be eliminated from the picture entirely, as they are not in the picture you drew in your pleadings, and we look solely to the barge.

Mr. Quinn: Yes, sir.

The Court: Or the tug.

Mr. Quinn: Yes, sir.

The Court: Whereas Mr. Collins, if I understand his position correctly, undertakes the defense by running his line in such a way that he is trying, perhaps has successfully shown that this was wholly unauthorized and that Young [264] Brothers is not liable; but he doesn't seem to me to get to the point of meeting you on your tug issue.

Mr. Quinn: I might point out that Mr. Collins would be entirely correct, if we had brought a suit in personam, that there is no doubt, if it were unauthorized, we would be barred. In fact this is a suit in rem.

True, Young Brothers came is as a claimant, but the liability tried is the liability of the Kolo.

The leading case on that is The China, which is an old case; but you will find the admiralty cases are largely old ones. The China, 7 Wall 53; 17 Law. Ed. 67. I am sorry, your Honor, 1868. And that was the case where the American authorities first split from the English authorities on this question; and that was the case of compulsory pilotage where the vessel was required by law to take a pilot and had no choice, could not direct his actions; the pilot was negligent, and the question before the Court was: Could the vessel be held liable under those circumstances? Held, so long as the person is in lawful possession of the vessel, he may render the vessel liable.

There is an article in 19 Harv. L. R. 445, Respondeat Superior in Admiralty,—I take it that is exactly what Mr. Collins is relying on, that there can be no respondeat superior in this case.—which is quoted in Robinson on Admiralty, page 365, that "liability in rem has no connection with the law of [265] master and servant, or with the maxim respondeat superior."

It has then been carried that a charterer, if the Court please, having no authority whatsoever from the owner to do anything except under contract, handling his own operations, which might be one single trip or voyage from Honolulu to Hilo to carry certain goods and back and turn the vessel over—en route the captain selected by the charterer

in California, with no one in the immediate vicinity; near the body was a gun, but not close enough for the deceased to have shot himself; on removing the bullet from the body of the dead man a ballistic check established that it was fired from the nearby gun; thereafter it was determined that the gun, and the fingerprint on the gun, belonged to John Doe, who lived in New York. Assuming that no evidence was introduced by the prosecution to show that John Doe was ever in California, or that he ever had any connection directly or indirectly with the deceased, and assuming further, that John Doe offered no testimony in his own behalf, would not the fact that it was his gun which took the life of the deceased be a sufficiently strong circumstance from which the jury could reasonably infer that he committed the homicide?

A situation analogous to the example just mentioned may be found in the case of *People v. Frank Jones* (Sup. Ct. App. Div. N.Y.), 12 N.Y.S. (2d) 635; leave to appeal denied 281 N.Y. 887; 22 N.E. 767. The factual situation, as stated by the Appellate Court, at page 636, is as follows:

> "On the night of October 21, 1937, the business house of the Parish Oil Company of Parish, Oswego County, New York, was broken into, the safe was blown and one dollar in United States currency was taken from the safe. The fact that a burglary, with all the concomitant circumstances of such a crime, had been committed was self evident. The only clue to the perpetrator of the crime was a fingerprint left upon the door of the safe. * * *

The people's testimony was purely circumstantial. It consisted of the fact that the place had been broken into, the safe had been blown and looted of one dollar in United States currency and that a fingerprint had been left upon the door of the safe. To connect the defendant with the fingerprint left upon the safe the state called two fingerprint experts, who testified that they had compared the known fingerprints of the accused with the fingerprint left upon the safe and they gave it as their opinion that the fingerprint on the safe was identical with the known fingerprint of the middle finger of the accused's left hand. The people also established that the prisoner did not have lawful access to and had not been at the place burglarized under such circumstances that the presence of the fingerprint upon the door of the safe could be accounted for upon any hypothesis of his innocence. No other testimony tending to connect the defendant with the commission of the crime was given. The defendant did not testify in his own behalf nor did he attempt to prove an alibi or to show that the fingerprint on the safe was not his, or, if it was his, to account for its presence upon the safe. The case was submitted to the jury in a fair and comprehensive charge to which no exception was taken. The court left it to the jury to say whether or not the fingerprint on the safe was that of the defendant. The jury found that it was and returned a verdict of guilty as charged in the indictment."

In affirming defendant's conviction for burglary and larceny, the Appellate Court concluded, at page 640:

"The fingerprints shown on the enlarged prints are clear and distinct and, with the aid of the expert testimony, prove beyond a reasonable doubt that the fingerprint found on the safe was made by the middle finger of the defendant's left hand. Expert testimony in aid of these prints, was proper. Marion v. B. G. Coon Construction Co., 216 N.Y. 178, 182, 110 N.E. 444. In the absence of evidence showing either that the fingerprint found upon the safe was not that of the defendant or, if it was, that it was placed there innocently, the jury were justified in finding that the defendant was the guilty party and that he committed the crimes charged beyond a reasonable doubt. The weight to be given to the testimony relative to the fingerprints was for the jury and not for the court. People v. Roach, supra, 215 N.Y. page 605, 109 N.E. 618."

In its opinion, the Appellate Court likewise cited, with approval, the case of *Parker v. The King,* supra, and in connection with this case said as follows:

"We have for review the interesting question whether, when the only evidence of identity against an accused person depends upon the resemblance between fingerprints, such evidence is sufficient to support a conviction. This precise question, so far as we can discover, has never been passed upon by the courts of this state but it was before the High Court of Australia in 1912 on an application for leave to appeal to that court from a judgment of conviction rendered in the Supreme Court of Victoria in Parker v. The King, 14 C.L.R. Austr. 681, British Ruling Cases Vol. 3 page 68. The defendant was tried and con-

victed on a charge of breaking into a shop and stealing therefrom the contents of a safe. *The only evidence against him depended upon a comparison of one of several fingerprints found on a bottle which was in the shop with a print of the middle finger of Parker's left hand taken while he was in jail.* The court in denying the application said at page 69:

> 'Signatures have been accepted as evidence of identity as long as they have been used. The fact of the individuality of the corrugations of the skin on the fingers of the human hand is now so generally recognized as to require very little, if any, evidence of it, although it seems to be still the practice to offer some expert evidence on the point. *A fingerprint is therefore in reality an unforgeable signature. That is now recognized in a large part of the world, and in some parts has, I think, been recognized for many centuries.* It is certainly now generally recognized in England and other parts of the English dominions. If that is so, there is in this case evidence that the prisoner's signature was found in the place which was broken into, and was found under such circumstances that it could only have been impressed at the time when the crime was committed. It is impossible under those circumstances to say there was no evidence to go to the jury.' '' (Italics supplied.)

Here are instances of convictions on the basis of a single fingerprint found at the scene of the crime, convictions secured unaided, as is appellee herein, by

the presumption of guilt, including venue, arising out of unlawful possession of narcotics.

In drawing this argument to a close, appellee particularly calls the attention of this Honorable Court to the case of *United States v. Perillo, et al.* (CCA-2), 164 F. (2d) 645, a case, incidentally, in which Stoppelli, the appellant in our case at bar, was indicted, but not tried, and in which a co-defendant, Joseph Venetucci, sought reversal of his conviction of violating the Jones-Miller Act, on the ground that the only evidence to connect him with the unlawful enterprise was a single fingerprint of his found on one of two packages of heroin contained in a paper bag. In this case, the codefendant Venetucci, as did the appellant in our case at bar, complained, in the language of the over-worked phrase, that he was convicted "on an inference based on an inference". The Appellate Court brushed this contention aside by saying:

> "We find no occasion to discuss the abstract proposition as to when an inference is not a permissible one because another inference removes it too far from established fact."

The Court did find that there was some additional evidence, namely, the testimony of an informer, which implicated the appealing defendant, and accordingly did not pass on the proposition whether or not the fingerprint alone was sufficient to sustain the conviction. A careful reading of this opinion supports the intimation, however, that the Appellate Court would

have ruled in the Government's favor on the basis of the fingerprint evidence alone.

Finally, the attention of this Honorable Court is called to the fact that approximately eleven ounces of a deadly drug, heroin, was sold to an undercover agent of the United States, in Oakland, California, for approximately $10,000.00. All who had anything to do with the transaction, including Stoppelli, are equally guilty. Only Stoppelli has appealed. This, of course, is his right, and no one challenges that right, but he cannot escape his liability by vigorously protesting, as he does, without basis in law, logic or fact, that the evidence is insufficient to support his conviction, that the fingerprint expert committed prejudicial error, and that the presumptions of guilt, including venue, arising out of unlawful possession of narcotics somehow cannot possibly be made to apply to him.

CONCLUSION.

The Court below, out of what appellee respectfully suggests was an overabundance of caution, granted the appellant herein his motion for a new trial on the conspiracy count of the indictment, basing its ruling primarily on the ground that the presumptions of guilt arising out of unlawful possession of narcotics are not applicable to a charge of conspiracy to violate the Narcotic Statutes. (Tr. 417.)

Appellee respectfully submits that it would be a grave miscarriage of justice to free the appellant, who,

acting behind the scenes, sent others forth to do his infamous work. The reversal of appellant's conviction, it is also respectfully submitted, would be an invitation to men like him to continue to use others to earn wealth for themselves without running the risk of having to pay the price of criminal responsibility for their traffic in human misery. The Congress, acting for the people, by inserting in the law the presumptions of guilt arising out of unlawful possession of narcotics, showed that no such result was intended. This Honorable Court, by its decisions, has lent strength to the determination of our lawmakers to make it extremely costly to one's liberty to in any way become illegally involved in the narcotic traffic, particularly when it is for profit.

In view of the foregoing, it is respectfully urged that the appellant's conviction on the first and second counts of the indictment should be affirmed.

Dated, San Francisco, California,
February 6, 1950.

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